No. 10805

In the United States Circuit Court of Appeals

For the Ninth Circuit

HARRY C. CLAIR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

Upon Appeal from the District Court of the United States, for the District of Oregon

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JURISDICTIONAL STATEMENT

This is a condemnation action brought by the United States to acquire 777.7 acres of land in Benton County, Oregon, in connection with the expansion of the Camp Adair Military Reservation.

The action was properly filed in the District Court pursuant to the Act of Congress of August 1, 1888 (25 Stat. 357, 40 U. S. C. A., §257) and Section 24 of the Judicial Code as amended (28 U. S. C. A., §41 (1)).

Two separate appeals have been taken from orders entered in the District Court in this action. By virtue of an order entered in this court on June 23, 1944, the two appeals have been consolidated for the purposes of briefing and argument.

The first appeal is taken from the Judgment on Verdict entered in the District Court on December 8, 1943.[1]

This court has jurisdiction over it by virtue of Section 128 of the Judicial Code (28 U. S. C. A., §225), it being an appeal from a final order of the District Court, a direct review of which may not be had in the Supreme Court of the United States under Section 238 of the Judicial Code (28 U. S. C. A., §345).

The second appeal is from a so-called "Final Judgment in Condemnation,"[2] which was entered in the District Court June 12, 1944, over six months after

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1 R 44-47.
2 R 65-70.

the entry of the Judgment on Verdict[3] from which Appellant took its first appeal.

Appellant contends that the District Court lacked the power to enter the so-called "Final Judgment in Condemnation" on June 12, 1944—that is, that it is void. If it is void, then a direct appeal may be taken from it.[4]

If it is not void and is the final order in the proceeding, then this court has jurisdiction by virtue of Section 128 of the Judicial Code (28 U. S. C. A., §225).

3 R 44-47.
4 *Phillips v. Negley*, 117 U. S. 665, 29 L. ed. 1013; *Stevirmac Oil & Gas Co. v. Diltman*, 245 U. S. 210, 62 L. ed. 248; *Hume v. Bowie*, 148 U. S. 245, 37 L. ed. 438; *Nelson v. Meehan* (C. C. A. 9th), 155 Fed. 1; *In Re Dennett* (C. C. A. 9th), 215 Fed. 673.

STATEMENT OF THE CASE

On December 3, 1942, the Government filed in the District Court its Petition for Condemnation of the property involved.[5] On the same date, it filed a Declaration of Taking[6] in which $20,872.90 is stated as the estimated just compensation. At the same time the agreed price of $20,872.90 was deposited in the registry of the court.

On December 23, 1942, the Government filed in the proceeding Appellant's Consent to Entry of Final Judgment and Petition for Partial Distribution of Funds. This consent provides in part as follows:[7]

> "* * * petitioning defendant (Appellant) does hereby agree to accept as full settlement of all claims against the United States of America and as full final and complete award of the reasonable and just compensation for the taking of the hereinbefore described lands the sum of $20,872.90, and petitioning defendant further represents and alleges that said sum of $20,872.90 is the full fair market value of the lands so taken; that the petitioning defendant Harry C. Clair does hereby submit himself generally to the jurisdiction of this court in this cause and does waive the right to the intervention of a jury in the above-entitled proceeding for the purpose of fixing the reason-

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5 R 9.
6 R 10-15.
7 R 25, 26.

able and just compensation to be paid to said petitioning defendant for the taking of the hereinabove described lands, and does expressly agree that just compensation therefor may be fixed by this Court without reference to a jury.

"Wherefore, petitioning defendant prays for an order of this Court fixing the full fair market value and the reasonable and just compensation for the taking of the lands aforementioned at the sum of $20,872.90 as of the date of the filing of the declaration of taking herein, and for an order of this Court directing the Clerk of this Court to pay to the petitioning defendant Harry C. Clair the sum of $12,000.00 in partial distribution of the aforementioned sum on deposit herein, without charging commission or poundage fee thereon.

HARRY C. CLAIR."

On the same date, an order was entered based upon the Consent and Petition for Partial Distribution of Funds directing the payment of $12,000.00 to Appellant.[8] On the next day, Appellant drew down the $12,000.00.[9]

Thereafter, and on June 7, 1943, counsel for the Government presented to the court an Order Fixing Value and Disbursing Funds and Final Judgment in Condemnation[10] and called as a witness the Chief of the Claim and Appraisal Section of the Real Estate

8 R 27, 28.
9 R 28, 29.
10 R 29-36.

Branch of the Army Engineers, who testified as follows:[11]

> "Q. Based on your experience as an appraiser, and your supervision of the work of appraising this land, what in your opinion was the fair, market value of the land, improvements and timber, on December 3, 1942, the date that the Declaration of Taking was filed?
>
> "A. Assuming there was no change between the date of the appraisal, which was in April, 1942, and the date of the Declaration of Taking, the value would be $20,872.90."

The court thereupon signed and entered the Order Fixing Value and Disbursing Funds and Final Judgment in Condemnation, which recites the execution by Appellant of the Consent to Entry of Final Judgment in the amount of $20,872.90[12] and finds that said amount is the reasonable and just compensation to be paid for the taking of Appellant's land.[13]

The order further directed the clerk to pay Appellant the sum of $8,872.90, which, with the $12,000.00 already drawn down by him, totals the agreed price of $20,872.90.[14]

Two days thereafter, Appellant drew down the

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11 R 38.
12 R 29.
13 R 33.
14 R 35.

$8,872.90[15] and the proceeding was closed insofar as all parties were concerned.

Thereafter, on September 3, 1943, without notice to Appellant, counsel for the Government filed a "Motion for Order Vacating Order Fixing Value and Disbursing Funds and Final Judgment in Condemnation."[16]

On the same day and apparently at the same time —and likewise without notice to Appellant—the trial court entered an order purporting to vacate the Order Fixing Value and Disbursing Funds and Final Judgment in Condemnation previously entered on June 7, 1943. Counsel for the Government was directed to mail Appellant a copy of the order.[17]

Appellant was thereupon forced to stand a jury trial to determine the reasonable and fair market value of his land, although he had already been paid the amount fixed and agreed upon following the entry of the Order Fixing Value and Disbursing Funds and Final Judgment in Condemnation previously entered on June 7, 1943.

On December 8, 1943, the jury returned a verdict in Appellant's favor for $15,100.00,[18] upon which a Judgment on Verdict was immediately entered.[19]

In due time, Appellant appealed from the Judg-

15 R 40.
16 R 41.
17 R 42.
18 R 43.
19 R 44-47.

ment on Verdict by filing an appropriate Notice of Appeal[20] and Bond.[21]

About six months after the Judgment on Verdict was entered and while this first appeal was pending in this court—and without notice to Appellant—counsel for the Government presented to the trial court for signature a so-called "Final Judgment in Condemnation," which would award the Government judgment against Appellant for the difference between the amount previously paid him and the jury's verdict.

The trial court refused to sign the "Final Judgment in Condemnation" until Appellant was notified.

When Appellant was notified, he filed his Showing in Opposition to the Entry of Final Judgment in Condemnation,[22] in which it was made to appear that the Government had disclaimed that any fraud or collusion existed in connection with the entry of the original consent judgment and hence that no possible ground existed to support the order of September 3, 1943, which purported to set aside the original consent judgment.

The trial court signed and entered the so-called "Final Judgment in Condemnation" June 12, 1944.[23] Appellant has taken a second appeal from it.

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20 R 48.
21 R 48-50.
22 R 58-64.
23 R 65-70.

The first question to be decided is whether the trial court had the power on September 3, 1943, upon motion of the Government and without notice to Appellant, to set aside and vacate the original consent judgment entered June 7, 1943, which had been fully executed by payment to Appellant of the amount therein fixed and agreed upon.

If the trial court lacked power to set the original consent judgment aside, as Appellant contends, then all subsequent proceedings in the trial court are also void and of no effect.

SPECIFICATION OF ERROR I

THE DISTRICT COURT LACKED POWER ON SEPTEMBER 3, 1943, TO SET ASIDE THE JUDGMENT PREVIOUSLY ENTERED ON JUNE 7, 1943.

(a) The original judgment was a consent judgment entered pursuant to an agreement between the parties and it cannot subsequently be opened up or set aside without the consent of both parties, no showing of fraud, mutual mistake or absence of consent having been made or existing in fact,

(b) A judgment voluntarily paid cannot be set aside without the consent of both parties,

(c) The Federal Rules of Civil Procedure do not apply to condemnation actions such as this (except as to appeals) so that the trial court lost control over the June 7, 1943, judgment upon the expiration of the March Term on July 4, 1943,

(d) The Oregon Statute giving Oregon courts discretionary power to relieve a party within one year from a judgment taken against him through mistake, inadvertence, surprise or excusable neglect is not applicable because (1) under

Oregon decisions this statute does not permit the opening of a consent judgment, and (2) in any event, the practice of the Oregon courts in exercising control of their judgments will not determine the action of the Federal Court on the subject because it is a question of power, not of procedure, and

(e) If the motion of September 3, 1943, for an order vacating and setting aside the original consent judgment be considered as a separate proceeding, Appellant was not notified of the proceeding and had no opportunity to be heard. Surely, he is entitled to a day in court before the original consent judgment is nullified. **In any event, no sufficient ground was urged or existed to warrant the entry of an order vacating or setting aside the original judgment either in the original case or in a separate proceeding.**

ARGUMENT

(a) The original judgment was a consent judgment entered pursuant to an agreement between the parties and it cannot subsequently be opened up or set aside without the consent of both parties, no showing of fraud, mutual mistake or absence of consent having been made or existing in fact.

When the Army decided to expand the Camp Adair Military Reservation, so as to include Appellant's property, the Government offered Appellant $20,872.90 for his property and handed him the Consent to Entry of Final Judgment and Petition for Partial Distribution of Funds.[24]

Appellant decided to accept the Government's offer and executed and returned to it the consent to accept $20,872.90 for his land.

When Appellant's consent to accept that sum was received, the Government filed its petition to condemn

24 R 21-26.

the property, the Declaration of Taking, and deposited in the registry of the court $20,872.90, which Appellant had agreed to accept.[25] Thereafter, counsel for the Government filed Appellant's consent to accept $20,872.90 and an order was entered directing payment of $12,000.00 of the amount deposited to Appellant pending final closing of the case.[26]

Thereafter, counsel for the Government presented to the court an order fixing the value of Appellant's land at $20,872.90 and Final Judgment in Condemnation, which directed that the balance of the funds on hand be disbursed to Appellant.[27] The Government's expert thereupon testified that the agreed price of $20,872.90 was, in fact, the reasonable and fair market value of the land.[28] The court thereupon signed and entered the final judgment and the proceeding was closed.

Let us now consider the finality which is accorded consent judgments such as the one entered in this action on June 7, 1943.

The authorities are unanimous in holding that such a judgment cannot subsequently be opened, changed or set aside without the assent of **both** parties, in the absence of fraud, mutual mistake or actual absence of consent.

The rule is well stated and the authorities sup-

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25 R 15.
26 R 27-28.
27 R 29-36.
28 R 38.

porting it are collected in a recent A. L. R. note in Volume 139, at page 422. It is there said:

> "It is a general rule that an order, judgment, or decree, entered by the court upon the consent of the parties litigant, being in the nature of a contract to which the court has given its formal approval, cannot subsequently be opened, changed, or set aside without the assent of the parties, in the absence of fraud, mutual mistake, or actual absence of consent, and then only by an appropriate legal proceeding."

The rule is stated in somewhat different language in 8 Cyclopedia of Federal Procedure (second edition), §3594, at page 339, as follows:

> "Consent judgments are in a class by themselves insofar as being subject to change or vacation is concerned. Since they rest upon contract, the agreement of the parties, the parties themselves are estopped to attack them except to show want of consent."

Freeman in his excellent work on Judgments (Vol. 3, §1352, page 2776) says:

> "A judgment by consent is an exception to the rule that a court may modify its judgments during the term. If it conforms to the agreement or stipulation, it cannot be changed or altered or set aside without the consent of the parties unless it is properly made to appear that it was obtained

by fraud or mutual mistake or that consent was not in fact given, which is practically the same thing. It will not be set aside on the ground of surprise and excusable neglect."

As is said in **Carpenter v. Carpenter**, 213 N. C. 36, 40; 195 S. E. 5, 7:

> "A judgment or decree entered by consent is not the judgment or decree of the court so much as the judgment or decree of the parties, entered upon its record with the sanction and permission of the court, and being the judgment of the parties it cannot be set aside or entered without their consent."

The rule is the same in Oregon.[29]

(b) A judgment voluntarily paid cannot be set aside without the consent of both parties.

It also should be remembered that the judgment entered June 7, 1943, was fully executed. The Government's title to Appellant's land was confirmed and Appellant was paid the price fixed and agreed upon.

In Freeman and Judgments (Vol. 1, §206, page 401) we find the following statement:

> "But where a judgment has been voluntarily paid and satisfied of record it has been held that it cannot be set aside, at least not in the absence of special circumstances."

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29 *Schmidt v. Oregon Gold Mining Co.*, 28 Ore. 9, 25, 28; 40 Pac. 406, 408, 1014, 1015.

Now let us see what the District Court attempted to do to this fully executed consent judgment.

On September 3, 1943—more than three months after the entry of the judgment—counsel for the Government filed with the clerk a document designated "Motion for Vacating Order Fixing Value and Disbursing Funds and Final Judgment in Condemnation."[30] The consent of Appellant was not suggested —he was not served with the motion and did not know it existed.

No fraud, mutual mistake or absence of consent was claimed or could be alleged or proven.

On the very same day—and likewise without notice to Appellant—the trial court entered an order purporting to vacate and set aside the fully executed consent judgment of June 7, 1943.[31]

Since the judgment of June 7, 1943, was a consent judgment—entered pursuant to an agreement between the parties—and since it was fully executed in all respects, it is clear under the authorities hereinabove cited that the trial court erred in attempting to summarily nullify it.

(c) The Federal Rules of Civil Procedure do not apply to condemnation actions such as this (except as to appeals) so that the trial court lost control over the June 7, 1943, judgment upon the expiration of the March Term on July 4, 1943.

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30 R 41.
31 R 42.

Rule 81(a) (7) provides:

> "In proceedings for condemnation of property under the power of eminent domain, these rules govern appeals but are not otherwise applicable."

Since the New Rules do not apply to the proceedings in the District Court in this action, it is necessary to determine whether the court had any control over the original consent judgment when it attempted to nullify it on September 3, 1943.

Disregarding for a moment the fact that the June 7, 1943, judgment was a consent judgment which had been fully executed, it may be conceded that prior to the adoption of the New Federal Rules and in proceedings in which they are not applicable that during the term at which an ordinary judgment is entered, the court entering it has full control over it.

However, Section 102 of the Judicial Code (28 U. S. C. A., §183) provides that terms of the United States District Court for the District of Oregon shall be held at Portland commencing on the first Mondays in March, July and November.

March 1 was the first Monday in March, 1943, so the original judgment was entered during the March term. July 5 was the first Monday in July, 1943, so the March term expired at midnight Sunday, July 4, 1943.[32]

Since the Government's application to set the orig-

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32 See *U. S. v. Perlstein*, 39 F. Supp. 965, 126 F. (2d) 789.

inal judgment aside was not made during the term at which it was entered, the trial court lacked the power to set it aside.

The rule is clearly stated in Vol. 5, Cyclopedia of Federal Procedure (original edition), §1523, commencing at page 107, as follows:

> "During the term at which a judgment in an action at law in a federal court is entered, the court's control over it is complete, and the general rule is that at that time it may set the judgment aside, vacate, modify, correct or annul it. It is equally true that such control ceases with the expiration of the term, and that thereafter the court cannot, as a rule, vacate or correct its judgment on motion, unless the term is continued for the purpose of the particular case. * * * The appropriate remedy to procure relief after the term in case the judgment is wrongfully or fraudulently obtained is by bill in equity."

In Freeman on Judgments Vol. 1, §196, pages 381-383) it is said:

> "All judgments regularly entered must become final at the end of the term. After that time the courts which entered them have no power to set them aside, except such as may be given by statute, unless some proceeding for that object has been commenced within the term and has been continued for hearing, or otherwise remains undisposed of.

"The interests of society demand that there should be a termination to every controversy. Courts have no power, after fully deliberating upon causes, and ascertaining and settling the rights of parties, to add clauses to their judgments authorizing the losing party to apply at a subsequent term to have the judgment against him set aside. If a vacillating, irresolute judge were allowed to thus keep causes ever within his power, to determine and redetermine them term after term, to bandy his judgments about from one party to the other, and to change his conclusions as freely and as capriciously as a chameleon may change its hues, then litigation might become more intolerable than the wrongs it is intended to redress."

It is not contended—and in any event is not the fact—that the March, 1943, term was extended for any purpose, so that it must be held that the trial court's order of September 3, 1943, is void.

(d) The Oregon Statute giving Oregon courts discretionary power to relieve a party within one year from a judgment taken against him through mistake, inadvertence, surprise or excusable neglect is not applicable because (1) under Oregon decisions this statute does not permit the opening of a consent judgment, and (2) in any event, the practice of the Oregon courts in exercising control of their judgments will not determine the action of the Federal Court on the subject because it is a question of power, not of procedure.

The Federal statutes under which this action was brought provide that the practice, pleadings, forms

and modes of proceedings shall conform as near as may be to the practice, pleadings, forms and proceedings existing at the time in like proceedings in courts of record of the state within which the District Court is held.[33]

Assuming for the moment that the practice of the Oregon courts with regard to opening up or setting aside judgments is controlling, the same result is reached—the order of September 3, 1943, is void.

In Oregon the trial court loses control over its judgments with the expiration of the term.[34]

There is an Oregon statute (§1-1007 O. C. L. A.) granting trial courts discretionary power to relieve a party within one year from a judgment taken against him through mistake, inadvertence, surprise or excusable neglect.

When the Government sought to nullify the June 7, 1943, judgment on September 3, 1943, it made no showing of mistake, inadvertence, surprise or excusable neglect, so that it cannot benefit by this statute.

In any event, the Oregon Supreme Court has held that this statute does not permit the opening up of a consent judgment such as the one entered in this action on June 7, 1943.[35]

Under controlling Federal decisions, it is established that the practice of the State Courts in exer-

33 40 U. S. C. A., §258; 50 U. S. C. A., §171.
34 *Stites v. McGee*, 37 Ore. 574; 61 Pac. 1129.
35 *Stites v. McGee*, 37 Ore. 574; 61 Pac. 1129.

cising control over their judgments has no relation to the power of the Federal Court in that regard.[36]

In 5 Cyclopedia of Federal Procedure (original edition), §1523, at page 112, it is said:

> "The practice of the state courts in exercising control over their judgments will not determine the action of the federal courts on the subject of setting aside or modifying judgments after the term, which is a question of power and not of procedure."

The authorities in the Federal Courts are uniform in holding that a trial court has no power to set aside a judgment after the term.[37]

In any event, an attempt to set aside an ordinary judgment at a subsequent term must be undertaken in a separate proceeding.[38]

(e) If the motion of September 3, 1943, for an order vacating and setting aside the original judgment be considered as a separate proceeding, Appellant was not notified of the proceeding and had no opportunity to be heard. Surely, he is entitled to a day in court before the original consent judgment is nullified. In any event, no sufficient ground was urged or existed to warrant the entry of an order vacating or setting aside the original judgment either in the original case or in a separate proceeding.

Under both Federal and Oregon decisions, the only way that the judgment could be attacked following the

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36 See 35 Harv. L. Rev. 602, 603; *U. S. v. Miller*, 317 U. S. 369, 87 L. ed. 251, 257, 258; *Chappell v. U. S.*, 160 U. S. 499, 512, 40 L. ed. 510, 514, 515; *U. S. v. 243.22 acres*, 43 F. Supp. 561, 129 F. (2d) 678; *U. S. v. A. Certain Tract*, 44 F. Supp. 712, 715; *Bache v. Moe*, 33 F. (2d) 976.

37 *Phillips v. Negley*, 117 U. S. 665, 29 L. ed. 1013; *Hume v. Bowie*, 148 U. S. 245, 37 L. ed. 438; See also 8 Cyclopedia of Federal Procedure (2nd edition) §3588, Pages 328, 329, notes 33 and 34.

38 *Stevirmac Oil & Gas Co. v. Dittman*, 245 U. S. 210, 62 L. ed. 248; *Hazel-Atlas Glass Co. v. Hartford Empire Co.* 88 L. ed. 936 (Adv. Ops.)

expiration of the March term on July 4, 1943, was by an entirely new and separate proceeding in which Appellant would be entitled to his day in court.[39]

No such separate or independent proceeding was filed. Appellant was not even served with the application to set aside the fully executed consent judgment and the order purporting to set the judgment aside was entered without notice to him.

If the District Court's order of September 3, 1943, erasing the original consent judgment, is to be sustained, then a person may be deprived of his property without notice, without a hearing and with no recourse.

Not only did the Government fail to assert that the fully executed consent judgment was tainted with fraud—which would be required in order to warrant the court in striking it down—it has since publicly and positively proclaimed that no fraud or collusion exists or existed in connection with the original judgment in this case.

In March, 1944, the Assistant Attorney General in charge of the Lands Division handed to the Portland newspapers for publication the following statement:[40]

> "In August and September, 1943, questions were raised as to the valuation of timber lands embraced in condemnation proceedings to acquire

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39 5 Cyclopedia of Federal Procedure (original edition), §1523, Page 109, Note 14; *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 88 L. ed. 936 (Adv. Ops.); *Wallace v. U. S.* (C. C. A. 2d), 142 F. (2d) 240, 244; *Stites v. McGee*, 37 Ore. 574, 61 Pac. 1129.

40 R 60, 61.

approximately 47,000 acres of land on which Camp Adair is located. I immediately requested a complete investigation by the F. B. I., relying on their usual policy of 'hewing to the line and letting the chips fall where they may.' It is only fair to all concerned to state that the results of that investigation by the F. B. I. are now in, and that there is no evidence of fraud, collusion or conspiracy to defraud the Government.

"However, in addition to requesting an F. B. I. investigation, I also caused a new timber cruise to be made by Henry Thomas of Portland, Oregon, because the agreed settlement of certain cases which representatives of this Department had made upon instructions of the War Department, had been based upon timber cruises in which the estimate of merchantable timber were said to be excessive. The original cruises were made by the firm of Mason and Bruce. The new cruises showed a marked reduction in the amount of merchantable timber. While it is entirely possible for experts to have differences of opinion as to such estimates, and as to values, particularly when the subject matter involves as many complications and uncertain factors as does the valuation of timber lands in the area in which Camp Adair is located, it nevertheless seems quite evident that every possible stick of timber, standing or down, was included in the original cruise as a basis for claims against the Government. Under

the circumstances and in view of the discrepancies in these cruises, I have had no choice but to order that all cases be tried.

"Quite apart of the F.B.I. investigation and the new timber cruises, I also dispatched to Portland one of the leading condemnation lawyers of the Department of Justice with instructions to look thoroughly into the entire matter, and to try the cases so that disputed values could be determined by juries. Seven cases were tried between November 29 and December 17, 1943, on the basis of the new cruises; values have been reduced in six of those cases.

"It is only fair to all concerned to say that Mr. C. U. Landrum also reported no evidence of fraud or conspiracy in the conduct of the individuals connected with these transactions."

The published articles are also in the record.[41]

It is apparent that no principle of law, justice or reason will sustain the trial court's attempt to summarily and **ex parte** nullify a fully executed consent judgment entered at a previous term.

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41 R 62-64.

SPECIFICATION OF ERROR II

THE DISTRICT COURT ERRED IN ENTERING THE FINAL JUDGMENT IN CONDEMNATION ON JUNE 12, 1944.

(a) This cause was then pending on appeal from the Judgment on Verdict,

(b) The term during which the Judgment on Verdict was entered had expired, and

(c) No showing of fraud, accident or mistake was made in connection with the application for the entry of the Judgment on Verdict and the Final Judgment in Condemnation was, in effect, a new judgment amending or setting aside the Judgment on Verdict originally entered.

ARGUMENT

(a) This cause was then pending on appeal from the Judgment on Verdict.

The Judgment on Verdict was entered herein on December 8, 1943.[42] Within ninety days thereafter, Appellant duly took an appeal from it by filing an appropriate Notice of Appeal and Bond.[43] Following the receipt and filing of the verdict, there was no reason why a final judgment could not then be entered and the form of Judgment on Verdict prepared and presented by the Government was accepted as such by it, Appellant and the Court.

A timely appeal having been taken from the Judgment on Verdict, the District Court was without jurisdiction to proceed further in the case and it had no

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42 R 44-47.
43 R 48-50.

power to thereafter enter a different or additional judgment.[44]

(b) The term during which the Judgment on Verdict was entered had expired.

Section 102 of the Judicial Code (28 U. S. C. A., §183) provides the terms of the United States District Court for the District of Oregon shall be held at Portland commencing on the first Mondays in March, July and November.

The verdict was received and the judgment was presented, signed and entered during the November term, 1943.

The November, 1943, term ended at midnight before the first Monday in March, 1944.[45]

Since the Government did not seek to amend the Judgment on Verdict during the November, 1943, term, at which it was entered, and until after an appeal had been taken from it, the District Court had no power to enter the so-called "Final Judgment in Condemnation," which was merely an amendment of the Judgment on Verdict, so as to award the Government judgment against the Appellant for the difference between the amount originally paid Appellant in December, 1942 and June 1, 1943, and the jury's verdict.[46]

If the trial court's power to set aside, alter or amend the judgment is not restricted to the period

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44 *Rothschild & Co. v. Marshall* (C. C. A. 9th), 51 F. (2d) 897; *Rogers v. Consolidated Rock Products Co.* (C. C. A. 9th), 114 F. (2d) 108.

45 See *U. S. v. Perlstein*, 39 F. Supp. 965, 126 F. (2d) 789.

46 See authorities cited on Pages 18 and 19 herein.

following its original entry and up until an appeal is taken or until the term expires, there is no reason why the court could not continue entering other and different judgments in this proceeding from term to term until Appellant should become exhausted resisting their entry and in attempting to procure a final determination on appeal.

(c) No showing of fraud, accident or mistake was made in connection with the application for the entry of the Judgment on Verdict and the Final Judgment in Condemnation was, in effect, a new judgment amending or setting aside the Judgment on Verdict originally entered.

If the Government's position is correct—that it is entitled to judgment against Appellant for the difference between the amount voluntarily paid following the entry of the original consent judgment and the amount of the verdict—there is no possible reason why a provision to that effect could not have been incorporated in the Judgment on Verdict entered December 8, 1943. Why such a provision was not included in the judgment entered at that time has never been disclosed. No showing of fraud, accident or mistake was made when counsel for the Government moved to have the so-called "Final Judgment in Condemnation" entered and it was then apparent from the published statement of the Assistant Attorney General in charge of the Lands Division[47] that Appel-

47 R 60, 61.

lant was not guilty of any fraud or collusion in connection with the entry of the original consent judgment, so that there was no possible justification for setting it aside.

What the Government was actually doing was asking the court to award it judgment against the Appellant for the difference between the amount previously paid Appellant and the jury's verdict, although it had the benefit of three investigations which conclusively proved that Appellant was entitled to retain the money voluntarily paid him following the entry of the Final Judgment in Condemnation on June 7, 1943.

No possible reason existed to warrant the trial court in entering the so-called "Final Judgment in Condemnation" on June 12, 1944. Appellant was guilty of no fraud or collusion or any unfair dealing in connection with the original award made on June 7, 1943, and he was guilty of no wrongdoing in connection with the entry of the Judgment on Verdict on December 8, 1943.

When the District Court attempted to enter the so-called "Final Judgment in Condemnation" of June 12, 1944, it lacked the power to do so and it is void.

CONCLUSION

The District Court lacked the power on September 3, 1943, to nullify the fully executed consent judgment entered on June 7, 1943, during a previous term. Its order of September 3, 1943, and all subsequent proceedings are void.

Obviously the District Court lacked the power on June 12, 1944, to enter the so-called "Final Judgment in Condemnation," since the November, 1943, term, during which the Judgment on Verdict was entered, had long since expired and this proceeding was then pending on appeal in this court.

Respectfully submitted,

HAMPSON, KOERNER, YOUNG & SWETT,
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